IN THE QUEEN'S BENCH,

APPEAL SIDE, 1857.

THOMAS E. WOODBURY,

(*Defendant in Court below.*)

APPELLANT;

vs.

CHARLES GARTH,

(*Plaintiff in Court below.*)

RESPONDENT.

APPELLANT'S CASE.

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PROVINCE OF CANADA,
DISTRICT OF MONTREAL. } IN THE QUEEN'S BENCH,

APPEAL SIDE, 1857.

THOMAS E. WOODBURY,

(Defendant in Court below,)
APPELLANT;

vs.

CHARLES GARTH,

(Plaintiff in Court below,)
RESPONDENT.

APPELLANT'S CASE.

This action was one instituted by the Respondent against the Appellant as the endorser of a Promissory Note, made by one Narcisse Trudeau, also a Defendant in the Court below, for the sum of £90 4s. 7d., bearing date Montreal, 2nd October, 1854, payable three months after date, and protested for non-payment on the 5th day of January, 1855.

To this action the Appellant pleaded three distinct exceptions, alleging in substance that true it was he had endorsed the note in question, but that the Respondent [Plaintiff in the Court below,] had long after the note had arrived at maturity received payments on account from the maker, and in fact taken from the maker, [Trudeau,] a note bearing date from the 4th day of April, 1855, for the sum of £72 7s. 6d., payable three months after date for the balance thereby, virtually discharging the Appellant.

The Appellant in support of these exceptions fyled two receipts signed by Respondent in favor of Narcisse Trudeau, one dated Montreal, 7th February, 1855, the other dated 4th April, 1855, the latter of which is worded as follow: "Mon-"treal, April 4th, 1855. Received from Mr. N. Trudeau his note at 3 months for "the seventy-two pounds 7s. 6d., said note being for the balance of note £90 7s. "6d., which I paid, and which note I hold till this note is paid, the expenses on "which to be settled at the same time. Signed, Charles Garth."

The Respondent, by his answers to the exceptions so pleaded by Appellant, alleged that although true it was he had received the said sums from Trudeau, on account of the note sued for, and although true it was he had taken Trudeau's note for the balance as set forth in the pleas, yet this was all done with the Appellant's knowledge and concurrence, and the last note was given as a matter of accommodation to the Respondent, and that Woodbury, the Appellant, sanctioned the whole proceeding, and promised to pay the old note in case Trudeau did not pay the new one.

Respondent to support his answers to Appellant's pleas, felt he was bound to make proof of the new facts by him set forth in his said answers, and to attain this object produced three witnesses to prove this new contract or undertaking on the part of the Appellant. These three witnesses were servants in Respondent's, [Plaintiff in Court below] employ, one of whom however, Nicholson, contradicts Buchanan, another witness, who swears positively that Nicholson and Lucas were present when the note was signed by Trudeau, and also heard what passed upon the occasion. To the adduction of verbal testimony to prove the new averment which has the effect of setting aside written evidence; the Appellant at Enquête objected, as appears on the face of the depositions of Buchanan, Nicholson and Lucas, which several objections were reserved by the Judges presiding at Enquête, and answers taken *de bene esse*, which answers were, upon the argument on merits, finally allowed by the Court, and Respondent's motion to reject the evidence, the answers so taken *de bene esse* dismissed with costs.

The Appellant contends that verbal evidence to disprove the receipts filed and to shew that the second note was only an accommodation note, cannot legally be adduced in this cause, in contradiction to Respondent's own receipt.

That the receipt given by Respondent to Trudeau is itself evidence of the arrangement between Garth, the Respondent, and Trudeau, and fully establishes the facts set up by Appellant in his exceptions, and that the Court below erred in allowing that evidence to be received. The rule of law that laches on the part of a holder of an endorsed Bill, however trivial, shall be operative in discharge of the endorser, is here set at naught, and the vague, uncertain, and contradictory testimony of two of Respondent's servants, allowed to set aside written arrangements which have for several years been considered as final and conclusive, so much so that Garth instituted an action in Supreme Court against Trudeau upon said last mentioned note. Appellant further contends that even if verbal evidence could be adduced under all the circumstances in this case to set aside the receipts given by Respondent, the presumptions from the evidence produced are in favor of Appellant. Appellant contends that the evidence of Buchanan should be wholly set aside, because he swears positively that Nicholson, one of the other witnesses, was present and saw and heard all that passed at the signing of the second note, while Nicholson distinctly says he knows nothing about the second note, and was not present at the making of it.

The Respondent's case would then rest upon the evidence of Lucas alone to prove the fact that Appellant was a party to the pretended arrangements set up in Respondent's answers in the Court below, which evidence is exceedingly vague, and flatly contradicted by Trudeau, who Appellant has examined as a witness Trudeau distinctly swears that Woodbury knew nothing of the transaction between him, Trudeau, and Garth; that he, Trudeau, and Woodbury were never at any time in Garth's office together, and that it was only after the institution of this action that Woodbury learned from him, Trudeau, what the arrangements had been between him and Garth.

To conclude, Appellant would most respectfully urge upon this Court that if a party endorsing a note which the holder, after protest, chooses to negotiate with the maker for, receive part payments and give delay by taking a new note for balance, keep the endorser in ignorance of the note being unpaid for several years, and when the maker has become a Bankrupt, and the endorser debarred of his recourse against maker, for the holder then to sue the endorser, bring up a couple of his servants to contradict what he himself has written with his own hand, and thereby saddle the endorser with the payment of a large sum of money with accumulated interest, it will be overturning all the rules by which commercial men have heretofore governed themselves, and may place the fortunes of one-half the community in jeopardy.

Montreal, September, 1857.

M. MORISON,
Attorney for Appellant.

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